E COPY

FILED
MAR 28 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1954

CHARLES GUSICK,
Petitioner,

vs.

ARIZONA,
Respondent.

No. 681

PETITION FOR WRIT OF CERTIORARI

FRANCIS J. BROWN,
Title & Trust Bldg.,
Phoenix, Arizona,

WM. SCOTT STEWART,
Chicago Temple,
Chicago 2, Illinois,
Attorneys for Petitioner.

BARNARD & MILLER, 33 S. Wacker Drive, Chicago 6. FRanklin 2-0562

INDEX

Summary of the Matter Involved 2

Questions Presented 3

Jurisdiction Involved 8

Opinion Below 8

Statement 9

Reasons for Granting Writ 35

Conclusion 35

Opinion in Full 37

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1954

CHARLES GUSICK, Petitioner, vs. ARIZONA, Respondent.	No.....

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES.

Petitioner Charles Gusick, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of Arizona, to review its judgment of March 1, 1955, entered in an original action, to the end that its judgment be reversed. The judgment of the State Supreme Court is shown here in the printed transcript of the record (R. 2). Also at the conclusion of the opinion of the State Supreme Court, herein p. 50. The State Supreme Court, by said judgment has ordered the dismissal of a petition for habeas corpus, after the trial court has decided that same was sufficient to raise the questions as presented, including that as to whether petitioner had been deprived of rights guaranteed by the Fourteenth Amendment in the court

of original conviction. The State Supreme Court in its opinion, herein p. 37, has stated that:

> "The ultimate question for determination is whether the application of Charles A. Gusick for a writ of habeas corpus stated grounds sufficient to confer jurisdiction on the trial court to issue such a writ."

It is the contention here, of Gusick, that when Judge Thomas issued the writ, Judge Thomas acted in the capacity of a federal judge. The petition for the writ of habeas corpus became defunct and its sufficiency or insufficiency should have been of no concern to the State Supreme Court, before Judge Thomas was offered an opportunity to hear the case and before Gusick was given a full hearing, which hearing had commenced. No return was made by the Warden, although time had been requested and granted to the Attorney General of the State, in which to make a return. The stay order entered by the State Supreme Court prevented any return. Without affording Gusick an opportunity for a hearing, the Supreme Court of Arizona has decided these constitutional questions against Gusick. The answer to many of these questions depended upon matters of fact, including what may have been done by the original court of conviction. Another federal question was raised for the first time in the State Supreme Court because of the manner in which the original certiorari case in that Court was adjudicated.

Summary of the Matter Involved

Petitioner, Charles Gusick, an inmate of the State penitentiary of Florence, Arizona, duly filed his petition for habeas corpus in the Superior Court of the State of Arizona, in and for the County of Pinal, before the Honorable Frank E. Thomas. The writ issued and Charles Gusick was produced in court, in response to its command. The Attorney General appeared and made numerous objections.

The cause was set for hearing. Before the hearing date was reached, the Attorney General of the State of Arizona filed an original petition for the writ of certiorari in the Supreme Court of Arizona. That Court issued a stay order. The trial court record was certified to the State Supreme Court in response to the writ of certiorari. As more fully appears from the record, including the opinion of the Supreme Court here appended, the trial court has been ordered to dismiss the petition for the writ of habeas corpus. The petition for the writ of habeas corpus made claim that due process of law had been denied Gusick in violation of the Constitution and laws of Arizona and as guaranteed by the Fourteenth Amendment (R. 1, Petition pp. 5, 20, 30, 40 G, 40 M, 40 Q, 40T).

No question arises as to the inherent power of the court presided over by Judge Thomas to entertain a petition on behalf of a prisoner in the State penitentiary, which is located in the County in which Judge Thomas was sitting.

Many of the questions raised before Judge Thomas were decided in the State Supreme Court, by arbitrarily assuming and finding certain facts to exist, instead of allowing the parties to contest these matters in a proper hearing. If Gusick has correctly stated the situation, in his petition for habeas corpus, he was sentenced for a term of three to five years,--which term has expired. There are many other claims made in the petition, but this one alone should have entitled Gusick to a hearing in the trial court, especially in view of the fact that the writ had issued and Gusick had been produced.

Questions Presented

1. We quote the final paragraph of the opinion rendered by the State Supreme Court, herein p. 50:

> "It is the holding of this court that the application of petitioner for writ of habeas corpus fails to state

> grounds justifying the issuance of such writ and the court erred in issuing the same. The records in said cause brought here on a writ of certiorari are remanded to the trial court of Pinal County with instructions to dismiss said petition." *

It appearing that Gusick, in his petition for writ of habeas corpus, claimed rights guaranteed by the Fourteenth Amendment, and that the trial court had issued the writ and had set a date for hearing, the question presented here is, did the State Supreme Court deny Gusick due process by virtue of the above holding and order?

2. Is it not true that when Gusick presented his petition for the writ of habeas corpus, based upon the claim that rights guaranteed him by the Fourteenth Amendment had been violated, the trial judge, in issuing the writ acted as a Federal Judge and had recognized that the claim of federal rights warranted a hearing?

3. The State Supreme Court, being one of concurrent jurisdiction with that presided over by Judge Thomas, is it not true that the State Supreme Court was without jurisdiction to review Judge Thomas, until after a hearing and until entry of a final order?

4. Is it not true that upon the issuance of the writ of habeas corpus the petition for the writ became defunct and consequently, the Supreme Court of the State was without jurisdiction to examine the sufficiency of the petition at all, by reason of established rules of practice? Judge Thomas, having decided the question of the sufficiency of the petition, including federal rights claimed, did the State Supreme Court have jurisdiction to re-examine

---

* Orderly procedure probably should have prompted the Supreme Court to first order Judge Thomas to vacate his order for the issuance of the writ and all proceedings taken thereafter. But no doubt this Honorable Court will consider the general effect of the judgment rendered.

this federal question before Judge Thomas had been afforded an opportunity to proceed to a hearing?

5. The State Supreme Court having seen fit to examine into the sufficiency of the petition for the writ of habeas corpus, and having held that same is insufficient and should be dismissed, should not this Honorable Court review the denial of claims made under the federal constitution, particularly when it appears from the record that the State Supreme Court has undertaken to find questions of fact, adversely to Gusick, without notice and in the absence of any opportunity to be heard?

6. The State Supreme Court has held that Gusick is limited to the records of the Maricopa County trial court, the court of the original conviction, in establishing his claim of lack of jurisdiction. Is it not true that Gusick should have been allowed a hearing on whether or not such alleged records were concocted and manufactured in his absence? Also should not Gusick be afforded a hearing and an opportunity to prove same, on claims made by him, which claims do not contradict the records, many of which claims he has asserted are supported by the records?

7. Is not the action of the State Supreme Court in this case a denial on the part of the State of the right of hearing upon a writ of habeas corpus?

8. Is not the holding made by the State Supreme Court that Gusick is limited to the records of the court of conviction, contrary to the law as settled by this Honorable Court, particularly concerning claims duly made in the petition for habeas corpus, that federal rights had been violated?

9. In view of the established rule that this Honorable Court will examine the record made in the State Courts, where it is claimed that federal rights have been violated, to ascertain if petitioner has been afforded proper con-

sideration, is it not the duty of this Honorable Court to examine said record, first as to the sufficiency of the claim of federal right and second, as to whether or not the State has afforded petitioner due process in its adverse ruling and holding that federal rights as claimed have not been violated?

10. After the State Supreme Court halted the hearing, which had duly commenced before Judge Thomas, and the record had been certified to the State Supreme Court as ordered and the original certiorari case had been submitted to the State Supreme Court for decision, it appears that the State Supreme Court, without notice and without hearing interpolated into the record, a certain alleged transcript, obtained by one of the Justices of the State Supreme Court, from the files of the original court of conviction. As soon as this action was called to the attention of Gusick, he moved to vacate this order and called the attention of the State Supreme Court that he, Gusick, claims that this alleged transcript was illegally manufactured, years after the event and was a fraud upon the Court. Gusick then and there claimed that to make use of such transcript would be to deny him due process as guaranteed by the Fourteenth Amendment. The State Supreme Court decided the case against Gusick and based its decision largely upon said transcript. Was this action of the State Supreme Court not a violation of due process, contrary to the rights guaranteed by the Fourteenth Amendment?

11. Is it not true that the claim made by Gusick that his sentence had expired raises a question of fact? Should not that question have been left to Judge Thomas for decision, after a proper hearing? Is it not a denial of due process for the State Supreme Court to decide this question of fact against Gusick, in the manner shown, without any opportunity to be heard, in violation of rights claimed

by Gusick for the protection of the Fourteenth Amendment?

12. The State Supreme Court has here held that what happened after the plea of guilty constituted no part of petitioner's trial and therefore Gusick need not be heard concerning claimed misconduct of the trial judge, in violation of rights guaranteed by the Fourteenth Amendment. Is not this holding contrary to the law as settled by this Honorable Court?

13. Where transcripts of the record of the court of conviction were certified by the clerk and attached, as exhibits to the petition for habeas corpus and introduced before Judge Thomas and it is claimed in the petition that many of these so-called records were made in the absence of Gusick, after the original court lost jurisdiction, in violation of rights guaranteed by the Fourteenth Amendment, and that such entries did not correctly reflect the original judgment, which was for a shorter term, did not the State Supreme Court violate due process by its decision, without any opportunity to be heard, that the questioned records did in fact merely portray re-writes of that which took place at the time of sentence? Is not this method of proceeding and this ultimate finding contrary to the settled decisions of this Honorable Court? Was not Gusick entitled to be heard? If these alleged records be regarded as corrections made of the original sentence did not due process require that Gusick be notified and given an opportunity to be present when the so-called corrections were made? In the absence of proper procedure in the court of conviction, should not Judge Thomas have been left free to pass upon the validity or invalidity of such alleged records?

14. The State Supreme Court having announced its duty to see that constitutional due process is accorded

every person charged with a criminal offense, and if the processes of law in the administration of justice are tainted with fraud, misleading a defendant to his prejudice, he should be accorded every right guaranteed to him under the due process clause of the State and Federal constitutions, should not the State Supreme Court have refused to intervene and was not due process violated when the State Supreme Court prohibited a hearing before Judge Thomas? Is it not the duty of this Honorable Court now to review the record to determine if the State Supreme Court has in fact fulfilled this duty, to see that petitioner receives constitutional due process?

15. Does not Gu ick here present novel questions, not heretofore determined by this Honorable Court, particularly when he claims that the State Supreme Court had no jurisdiction to review the judgment of Judge Thomas, in the matter of the issuance of the writ, because Judge Thomas had acted in the capacity of a federal judge and the State Supreme Court could not properly supervise his action until a final order had been entered by Judge Thomas?

Jurisdiction Invoked

The jurisdiction of this Honorable Court is invoked under Title 28, Judicial Code and Judiciary § 344, United States Code, Judicial Code, section 237. The judgment was entered March 1, 1955, (R. 2) as appears from the appended opinion, herein page 37.

Opinion Below

The opinion of the Supreme Court of Arizona is appended, herein p. 37. Not yet Reported. Judge Thomas rendered no opinion. Orders entered by Judge Thomas are shown of record.

Statement

When Gusick, through his attorney, presented his petition to Judge Thomas, in the habeas corpus trial court, he also submitted a printed brief. The printed petition and this brief became part of the record in the trial court and as such was certified to the Supreme Court of Arizona. The Clerk of the Supreme Court has, in turn, certified the record for use in this Honorable Court, which record includes reference to our trial court brief. Each time any of the parties appeared before Judge Thomas, the habeas corpus judge, the official reporter was present and recorded that which took place. This Reporter's Transcript was also printed and made a part of the trial court record and is now here.

The record here will show the petition filed by the Attorney General of the State for certiorari in the State Supreme Court. Also our suggestions in opposition.

Your Honors will note from the opinion appended hereto, p. 49, that Mr. Justice Phelps has said:

> "For the sole purpose of ascertaining if the charges made were true we ordered a transcript of the language used by the trial court in pronouncing its sentence upon petitioner on August 22, to be made a part of the record in this case and it conclusively refutes the charges made against the trial judge relating to falsifying the records of his court."

Your Honors will find from the record now here, that when we learned of the entry of the ex parte order in the State Supreme Court making this alleged transcript a part of the record of the State Supreme Court, we protested and made a motion to vacate. This motion, together with our suggestions was also printed and is now part of the record here. We have filed in this Honorable Court nine copies of each of the various matters printed for use in the courts below, together with a printed copy of transcript of the record certified here by the Clerk of the State Su-

preme Court. This record refers to these printed portions, but we have not duplicated the printing for the present. In the event that his petition is allowed, it is our intention to place the matter of further printing and supervision, in the hands of the Clerk.

From the following quotations made from our suggestions in support of our motion Your Honors will perceive that we gave notice to the State Supreme Court that we expected to be able to prove that this so-called transcript was but a fraud on the court. This notice given by us to the State Supreme Court was furnished before the opinion of the State Supreme Court was handed down. We quote from our motion to vacate, (R. 2) here as an appendix.

> "Neither Charles Gusick nor the undersigned learned of the entry of the above order until the day after same had been entered. There had been no motion made, no notice and no opportunity for a hearing.
>
> "If notice and hearing had been afforded, the undersigned would have sought, in some way, to show the circumstances under which the alleged transcript was made. It is the respectful contention of Charles Gusick, that the alleged transcript was not in fact made from shorthand, or any other notes, taken at the time of sentence, but this spurious transcript was manufactured some days after the sentence, in order to conform to the void judgment, which void judgment, as has been alleged in our petition for habeas corpus, was also manufactured, in the absence of Charles Gusick and illegally made and entered of record after the Superior Court of Maricopa County had lost jurisdiction. It is the contention of Charles Gusick, as is further shown by his petition for the writ of habeas corpus, that the Official Reporter was not present at the actual entry of sentence and that this subsequently manufactured transcript does not correctly report that which was said by the Court at the time of sentence. We respectfully refer Your Honors to Exhibit KK of the petition for habeas corpus, p. 123, which exhibit is now a part of the record in this Honorable Court, * * * ."

Your Honors will observe from this letter that the official reporter corroborated the claim made by Gusick that the reporter was not present at the time of the original sentence. As Your Honors will perceive from the record, (R. 2) this spurious transcript falsely purports to be a shorthand account of that which occurred on the day of judgment. The State Supreme Court has accepted it as such.

We quote further from our suggestions made to the State Supreme Court:

> "The undersigned respectfully represents that if Charles Gusick were afforded a hearing, it could be made to appear that the true record and many other circumstances, support the allegations of his petition, including the allegation that the first and only valid sentence was for but one term, which has expired, and that the alleged transcript, now made part of the record hereby Your Honors, is a fraud upon this Honorable Court.
>
> "It is respectfully contended by Charles Gusick that the inadvertent entry of the above order, making this spurious transcript a part of the record here, without notice, in the absence of an opportunity to be heard, deprives Charles Gusick of due process of law, as guaranteed by the Constitution and laws of Arizona and further protected by the Fourteenth Amendment to the Constitution of the United States."

This timely claim, as to rights guaranteed by the Constitution of the United States, is shown in the record here (R. 2). It concerns an error which had not been made while the case was before Judge Thomas. This error occurred in the State Supreme Court. We continue to quote from our motion to vacate (R. 2). Also see appendix

> "Charles Gusick, by the undersigned, respectfully prays that the above order of this Honorable Court, entered February 4, 1955, as aforesaid, be expunged and held for naught, that the alleged transcript be

stricken from the files as an interpolation on the record here and that this Honorable Court proceed in the usual manner, upon the proper record as previously made up here.

"The undersigned respectfully represents that, if after considering this motion, together with these suggestions, Your Honors arrive at the conclusion that the Official Court Reporter should be heard or any of his writings should be considered, that the proper place for such hearing would be in the trial court. Of course, with all due respect, Your Honors have the power to choose some other method of arriving at the facts, but we suggest that this Honorable Court is obliged to afford Charles Gusick due process."

The facts appear in the petition for habeas corpus originally filed before Judge Thomas and, accompanied by certain Exhibits, including court records. Herein, when we refer to page numbers, we have reference to the petition for habeas corpus and the Exhibits thereto attached (R. 1). See appendix here.

Charles Gusick, petitioner, was convicted on his plea of guilty to a sex crime, designated in the heading to the statute as Fellatio, a felony. At the request of petitioner, the Warden has furnished a certified copy of the judgment or sentence, Exhibit NN, p. 305, from which it appears that petitioner is being held to serve twenty separate sentences of three to five years each. One of these twenty sentences has been served, according to the record kept by the authorities. Petitioner has attacked this long sentence and contends that it is void for many reasons. For one thing, this long sentence was written up by the Clerk, at the direction of the trial judge, in the absence of petitioner, after the trial court had lost jurisdiction.

Your Honors will find four judgments, or sentences, shown by the record.

First, is that rendered in open court by the trial judge from the bench in the presence of Your petitioner for a term of three to five years.

Second, that written up by the deputy clerk and Your petitioner had been taken from the bar of the Court. This judgment, Exhibit III, p. 117, has been marked void by the Clerk. The Clerk has refused to certify this judgment, claiming that it is not of record.

Third, a judgment or docket entry, entered in the absence of Your petitioner, falsely purporting to show his presence in court on August 23, 1951, Exhibit MM, p. 184.

Fourth, a judgment entered in the absence of Your petitioner on August 24, 1951, Exhibit AA, p. 41, which judgment again appears in a certified copy, Exhibit NN, p. 305, as authority by which the Warden retains custody of Your petitioner.

It is the contention of petitioner that the **third** judgment is void, having been entered in his absence after the trial court had lost jurisdiction. The Warden makes no claim to the right of custody under the **second** or **third** sentence. It is the contention of petitioner that none of these judgments or sentences is valid. We designate all of them as judgments merely for identification.

The matter of deciding whether the first judgment was in fact valid was submitted to the habeas corpus trial court, along with the claim that the sentence had been served, until the State Supreme Court took over. The fact that a sentence of three to five years had been served was beyond dispute.

Under the law of Arizona the sentence is that which was said orally by the judge from the bench on August 22nd, in the presence of Gusick. Gusick was there and has sworn that the original trial judge, Judge Jennings, sentenced

him to but one term of three to five years. This assertion raises a question of fact. It is claimed by Gusick that this assertion by him concerning the original sentence is not contradicted by any valid record of the court of original conviction. It is contradicted by the fraudulent transcript, but the credence to be given this manufactured transcript was a question which should have been left to Judge Thomas after a proper and full hearing. The claim made by Gusick in his petition for habeas corpus also might find some contradiction in various orders and minutes. Here again the credence to be given such alleged records should have been left to Judge Thomas after a proper hearing. Some were made in the absence of Gusick, without notice, and it is claimed that they are void. The State Supreme Court decided these points against Gusick without notice to him or any opportunity for a hearing, by making an independent investigation and incorporating into the State Supreme Court record, a purported transcript, which had been filed in the office of the Clerk some three years after the original sentence. This transcript was, according to the claim made by Gusick, in a motion to vacate, manufactured and fraudulent. Gusick claimed that the official reporter was not present at the time of the first sentence and asserted that this claim is corroborated by a letter written by the reporter and appearing here as Exhibit KK, p. 123.

As appears from the Docket, Exhibit MM, p. 181, the information, in twenty counts, Exhibit FF, p. 100, was filed on June 12, 1951. Petitioner entered his plea of not guilty, to each count in the information, on June 18, 1951, Exhibit MM, p. 181. On August 17, 1951, petitioner was allowed to withdraw his plea of not guilty, p. 184. The Docket contains the following entry as of said date, p. 184:

> **"The defendant now enters a plea of guilty to the charge of Fellatio, a felony, Counts 1 through 20."**

The State Supreme Court examined this record and disregarded the claim made by Gusick, that he pleaded guilty to but one charge. In contradiction of the record and with no opportunity to be heard, the State Supreme Court arbitrarily held, herein pp. 42, 43, that Gusick:

> " * * * entered a plea of guilty to all of said Counts, 1 to 20 inclusive."

Petitioner contends that the Clerk here was not strictly accurate. The entire record when considered will show that petitioner merely tendered his plea of guilty. It was never expressly accepted. Perhaps it may be said that acceptance was final by implication when the trial judge rendered the first judgment. The oral rendition from the bench occurred on August 22, 1951. Before this point was reached, the trial judge of his own motion raised and decided the question of the mental capacity of petitioner to enter any plea, also whether by reason of his insanity, petitioner was legally responsible for his acts. Along with these questions, the judge considered the matter of the extent of the punishment to be inflicted before any decision was arrived at concerning the final acceptance of the plea. It is the contention of petitioner that all three of these questions were determined by the trial judge in the absence of petitioner without proper proof or procedure. It is the claim and belief of petitioner that the trial judge, upon learning that an agreement had been made under which a plea of guilty was to be tendered, got busy and conducted his own private investigation out of court in order to decide these questions. Further that they were decided by the judge, even before the plea of guilty was tendered.

The State Supreme Court ignored the question raised as to mental capacity and the manner in which it was disposed of. The State Supreme Court herein, p. 42, listed some of the claims made by Gusick and included the following:

> "VI. The receipt of information in chambers by the trial judge, in the absence of petitioner and his counsel violated the constitutional guaranty of the right of petitioner to be confronted with witnesses against him."

This was held to be without merit as a proposition of law, and was, according to the opinion, not remotely related to the question of the jurisdiction of the trial court to pronounce its judgment. We quote from the opinion, p. 46:

> "Petitioners sole remedy to have had these matters reviewed by this court was by timely appeal."

This holding is contrary to the applicable decisions of this Honorable Court in many habeas corpus cases.

A number of contentions made by Gusick in his petition have been disposed of as follows by the State Supreme Court, herein p. 42:

> " * * * he entered his plea of guilty to Counts 1 to 20, inclusive, of the information. That plea was made by him in open court. This act on the part of the petitioner concluded the trial in that case. What happened after that moment constitutes no part of his trial."

The above holding, that what happened after the entry of the plea constitutes no part of his trial is no answer to contentions made by Gusick and is contrary to applicable decisions in this Honorable Court in habeas corpus cases.

It is the respectful contention of Gusick here, as claimed in his petition for habeas corpus, that the conduct of the original trial judge in this regard concerning the conduct of the judge, deprived Gusick of due process.

When the case was called, on August 22, 1951 before the Honorable Renz L. Jennings, Judge of the Superior Court of Maricopa County, Arizona; the judge retired to chambers with the attorneys for both sides. There, out of the presence of petitioner, was held a lengthy discussion be-

tween Court and counsel as to whether the plea of guilty should be accepted, and if so, what would be a proper sentence to be entered on it. Also discussed in this meeting between counsel and the judge was the question of the sanity of petitioner, whether or not he knew the difference between right and wrong and if he was responsible criminally for his acts. The Official Court Reporter was present and later made a transcript, from his notes, showing these proceedings in chambers. On August 24, 1951 this transcript was duly made a part of the record by order of Court, p. 188, and is shown as Defendant's Exhibit 4, p. 124. From this transcript it appears that the plea of guilty was tendered to but one charge, under an agreement made between the late Mr. George Wilson, the attorney for petitioner and the County Attorney, p. 125, to the effect that if the Court entered a sentence, not a ridiculously low sentence in one case and the prosecution was satisfied with the sentence, if it were not a suspended sentence, that would terminate all cases and ultimately all would be dismissed.

The record shows the following, Petition p. 125:

> "Mr. Wilson: To begin with here, of course **the plea of guilty is the result of a stipulation between the County Attorney and the defendant's counsel** that we would plead guilty to one case and have it done with and that if they were satisfied with the sentence, if it wasn't a suspended sentence or ridiculously low sentence, that would terminate all cases and ultimately all would be dismissed. We agreed to it.
>
> Mr. McCarthy: For the record, we did talk about it, **we did have an understanding and agreement to that effect.** I don't think there was a stipulation to that effect.
>
> Mr. Wilson: No written agreement. * * *
>
> Mr. McCarthy: In reply to Mr. Wilson's statement, I feel that in fixing any punishment consideration

should be given to the statutes of the State of Arizona for the crime charged. **The law states the penalty of one to five years may be imposed, thereby giving the Court a range of discretion, depending upon the defendant, the circumstances of the case and the enormity of the crimes which he has committed.** * * *

Mr. Wilson: May I state I doubt the ability of the State to prove all counts we have pleaded guilty to, and I have met some adverse criticism from my client on account of my advice to plead guilty."

Petitioner has alleged that he has a meritorious defense to the charge and that his rights, including a jury trial were known to him. Petitioner was influenced by the advice of Mr. Wilson to plead guilty to but one charge under the agreement. Also the experience had by petitioner with the authorities, their tactics, and the hostility of the press had created a condition where mob rule was feared. Petitioner had given up any hope of securing a fair trial by an impartial jury. Petitioner relied upon Mr. Wilson when he was informed that the agreement had been approved by the trial judge and the longest sentence which could possibly be given would be five years. There was a very good reason to hope for one of a year or so. The County Attorney had said that the judge would give great consideration to the fact that such plea would save the boys involved from participation in a contested trial, where their appearance would be given extensive press coverage. That the judge would also take into consideration the expense that would be saved. That the judge would give great weight to the fact that petitioner had no previous charges against him. That the judge knew that it would be improper under the law for the prosecution to proceed with all twenty counts. The judge knew and the prosecutor realized that many of the counts could not possibly be proven. Mr. Wilson gave petitioner many more reasons

why it was best to plead guilty under the agreement and assured petitioner that in no event would the law allow a sentence of more than five years. Even if such a severe sentence as five years should, for some unknown reason, be announced, the practice would permit petitioner to withdraw his plea and demand a jury trial. Petitioner points to the record for corroboration and now asserts that Mr. Wilson truthfully reported the situation as it stood just before the plea was tendered. Petitioner alleges that all concerned kept the agreement to the extent that petitioner was sentenced to a term of three to five years. Something happened, after petitioner commenced his sentence, to cause the trial judge to increase the penalty.

When this agreement was made there were pending a number of other indictments. These indictments have since been dismissed. It is the contention of petitioner that the **first** sentence was rendered from the bench in accordance with the agreement. It was for three to five years, not ridiculously low. The prosecution was satisfied and it terminated all cases. Trouble for petitioner came later when the trial judge decided to increase the penalty by the **fourth** sentence.

Prior to this discussion in chambers there had been considerable difficulty over the matter of bail. The amount demanded by the County Attorney was so high that petitioner was compelled to apply to the Supreme Court, where a reduction was ordered, p. 86. After petitioner furnished bail as fixed by the Supreme Court, the County Attorney filed additional informations in an effort to so increase the bail that petitioner would be unable to furnish it. The Supreme Court was again appealed to and a reduction ordered, p. 92. Mr. Justice Udall said, p. 94:

> "The method pursued to keep the petitioner in jail was the practice of filing multitudinous charges and

> obtaining orders from the magistrates requiring additional bail, thus circumventing the constitution as well as flouting the clear intent of this court's previous decision. These tactics hardly comport with our concept of American justice. The guarantees provided by the federal and state constitutions apply equally to all and they cannot be denied to any one person without weakening the rights of all."

After the Supreme Court granted relief in its second consideration of the matter, petitioner was released on bail and remained out until he entered his plea of guilty at which time he was taken into custody and has been in jail and prison ever since.

During this discussion in chambers, it was made to appear by various statements made into the record by the trial judge that the judge had consulted with the County Attorney and had examined certain statements taken by the County Attorney from the boys involved in the crimes charged. These statements have been made part of the record by order of Court, which order was entered after sentence, p. 188. At the time these statements were examined by the Court, they had not been introduced in evidence. They were hearsay. The judge also examined certain films and records taken from the home of petitioner. These were never put in evidence. As further appears from the transcript, the judge upon his own motion, without notice, appointed a Dr. McGrath, some time before the plea of guilty was offered. The judge had been informed that a plea would be tendered, pursuant to the agreement made, and the judge according to his own statement, wished guidance. The judge requested Dr. McGrath to go over the statements made by the boys and to witness the films and examine the records. All of this was done out of the presence of petitioner and without his knowledge at the time. Dr. McGrath never saw or talked with petitioner, or

his counsel, although he consulted with the County Attorney and the judge. Dr. McGrath wrote a letter to the judge as is shown by the record, pp. 136, 149, 179 in which Dr. McGrath presumed to decide the case for the judge. It appears from the comment of the judge preserved of record that the judge eventually adopted the decision made by Dr. McGrath. Petitioner claims that all of this was illegal to the extent that the sentence rendered is void.

Petitioner alleges that when the judge and counsel finished their conference in chambers, the judge mounted the bench and orally rendered judgment. The transcript shows where the discussion in chambers ended and the proceedings were continued in open court, in the presence of the petitioner, p. 140. After some remarks by the Court and counsel, there appears the following note by the reporter, p. 142:

"(The Court then pronounced sentence on the defendant.)"

Petitioner has sworn in his petition that the trial judge sentenced him to imprisonment for a term of three to five years on all counts, which sentence was to begin as of the date of judgment, August 22, 1951. Petitioner was taken from the bar of the court and lodged in the County jail to await transportation and delivery to the penitentiary.

Petitioner was taken from the jail on August 24, 1951 and delivered to the Warden on the same day.

Petitioner contends that as soon as the sheriff took him from the bar of the court on August 22, 1951, petitioner commenced on the service of his sentence and the trial court lost jurisdiction. It is contended by petitioner that the only sentence which could be said to be valid in this case is that rendered in his presence in open court, on

August 22, 1951, which was for the period of three to five years. That sentence has been served.

Petitioner states positively that he was not returned to court at any time for resentence or for any other purpose subsequent to the rendition of sentence on August 22, 1951, and that consequently all subsequent orders concerning his sentence insofar as they might conflict or add to his original sentence are void.

As appears from the record, certain docket entries were made, p. 184, to signify that petitioner was sentenced to serve twenty terms. Petitioner asserts that these do not constitute a sentence in any event, that they were made after the court lost jurisdiction and are not accurate. The Clerk prepared and entered of record a certain judgment. This was done by the Clerk after the trial court had lost jurisdiction. Petitioner has alleged that when this judgment order was called to the attention of the trial judge, the judge directed the Clerk to mark the same void. The judgment was so marked, p. 117. The Clerk has refused to certify same, giving as his reason that this **second** judgment is not part of his record. Petitioner has attached a copy of this voided order as Exhibit HH, p. 117, and has filed a photostat of the original.

The important thing to consider is that a formal judgment was entered signed by the trial judge, p. 51, and filed on August 24, 1951. This judgment is shown as Exhibit AA, p. 41 and is the same as that certified by the Warden as his mittimus, p. 305. Petitioner alleges that this **fourth** sentence was entered in his absence after the trial court had lost jurisdiction. There is no claim shown by the record that this **fourth** judgment was made necessary in order to correct previous mistakes. No notice was given petitioner. According to petitioner this **fourth** judgment falsely finds

that petitioner was present on August 24, 1951 in open court, when this **fourth** judgment was entered. Petitioner has sworn that all details to be found in this **fourth** judgment by which the trial judge attempted to create an additional penalty, by directing the judgment be entered on each of the twenty counts, and that one sentence follow the other, was conceived after the trial court had lost jurisdiction and further that nothing said at the time sentence was rendered in open court could possibly form a basis for this increased penalty. It is the contention of petitioner that the plea of guilty was tendered to but a single charge. This is shown by the record. Exhibit MM, p. 184. This guilty plea was tendered pursuant to an agreement between petitioner, represented by his attorney and the People represented by the County Attorney. Under this agreement petitioner was to be sentenced for only one crime for a term not to exceed five years. The trial judge knew of this agreement before and at the time of the offer of the plea of guilty. The trial judge, in chambers, during a discussion as to the extent of a sentence, to be rendered, within five years, indicated that the judge had no objection to the agreement, further than the judge did not consider himself bound by the agreement concerning the other informations.

As the other informations have been dismissed that question is out of the case.

The State Supreme Court has resolved all of these questions against Gusick, by arbitrarily holding that the original oral sentence rendered by Judge Jennings was for 20 consecutive sentences and that the various fumblings by the Clerk were but attempts to put the original long sentence on record. Gusick was afforded no opportunity to be heard, before this conclusion was arrived at in the State Supreme Court.

The arbitrary finding made by the State Supreme Court, that Gusick pleaded guilty to 20 charges, contradicts the plain record. Also, the State Supreme Court ignored the claim, made by Gusick, that a plea to one charge cannot lawfully be made to support any judgment for 20 sentences.

From the opinion rendered by the State Supreme Court, it appears that that Court concluded from the petition for habeas corpus that Gusick has charged his lawyer, George Wilson, now deceased, with unethical conduct. We are unable to find any such charge in the petition.

The State Supreme Court attempted to sum up the claim made by Gusick concerning the plea of guilty as follows, herein p. 42:

> "V. A plea of guilty should be freely and understandingly made by one competent to know the consequence thereof, and the Court should satisfy itself as to this voluntary character of the plea before accepting it."

This is only a small part of the claim really made by Gusick in this petition.

The State Supreme Court endeavored to restate the propositions made by Gusick. This was done, apparently, by making a copy of certain headings in our brief as submitted to Judge Thomas. The State Supreme Court erected men of straw. The claims as really made to Judge Thomas are to be found in the petition for habeas corpus. The brief headings to be found in our trial court brief were not intended to be full explanations.

The State Supreme Court said, as above stated, herein p. 45:

> "The charges set forth in the petition for a writ of habeas corpus upon which petitioner's Claims Nos.

IV, V, VI and VIII are based are not only without merit as propositions of law, but are not remotely related to the question of the jurisdiction of the trial court to pronounce its judgment and sentence upon petitioner on August 22 and therefore may not be reviewed on habeas corpus proceedings. Petitioner's sole remedy to have had these matters reviewed by this Court was by timely appeal."

Here again if the claims made by Gusick were really understood and properly stated the State Supreme Court could not limit Gusick to redress by appeal, without running counter to many decisions heretofore rendered by this Honorable Court.

Petitioner offered his plea of guilty in open court on August 17, 1951, Exhibit MM, p. 181. At that time the judge and prosecutor knew that this plea was tendered pursuant to an agreement that it was to support but one sentence of not more than five years. The offered plea was not accepted on August 17, 1951. It was never accepted, unless the oral sentence delivered from the bench in open court, in the presence of petitioner, can be termed an acceptance by implication. If this be an acceptance this August 22, 1951 is the date of conviction under the Code. The Code provides that three days should elapse from the acceptance of a plea of guilty before sentence. This was not done. Petitioner contends that as all three sentences were made before three days they are all void.

We quote the holding made by the State Supreme Court upon the point that three days was not allowed to elapse, herein p. 42:

"The answer to that is that the record brands it as false *in toto*. The record clearly shows that on August 17 the petitioner through his counsel asked leave of the Court to withdraw his plea of not guilty to Counts 1 to 20, inclusive, of the information. This request was granted by order of Court duly recorded and peti-

> tioner then and there withdrew his plea of not guilty and entered a plea of guilty to all of said Counts 1 to 20, inclusive. Whereupon the Court set aside the date of sentence for 10 a.m. August 22 following—exactly five days after the plea of guilty. There was not the slightest excuse for such charge to be made."

Gusick, in his petition and by his brief has claimed that the three days did not commence to run until the plea of guilty to but one charge was accepted. This answer given by the State Supreme Court, apparently without any understanding of our point, demonstrates the danger of decision without any opportunity to be heard. The question was but one of many to be submitted to Judge Thomas.*

The above finding made here again by the State Supreme Court that Gusick entered a plea of guilty to all of said Counts 1 to 20, inclusive, is contradicted by the record made in the original trial court, at the time of the entry of the plea. Exhibit MM, petition p. 184 (R. 1).

The State Supreme Court has held, herein p. 43:

> "Petitioner is limited to the records of the Maricopa County trial court in Cause No. 22012, *supra*, in establishing his claim of lack of jurisdiction. The records show that petitioner was present in court with his counsel on August 22 when the Court pronounced its sentence and judgment. Petitioner admits this in his brief. There is written on each page of the minute entry records on that date the word 'void' but nowhere in the record is found a minute entry whereby

* We realize that a violation of the Arizona code on the subject of three days may have been determined against Gusick on adequate State grounds, that Your Honors may feel bound by the decision of the State Supreme Court. We point out our claim and the answer made by the State Supreme Court in support of our argument here that in the absence of an opportunity to be heard caused the State Supreme Court to fail to even understand our points.

> the judge of the Court ordered said minute entry to be voided. In the absence of such an order the minute entry of August 22 stands as a valid minute entry of the Court recording the imposition of sentence upon petitioner on that date."

This finding ignores a number of claims made by Gusick, upon which he asserts he was entitled to a hearing. It is true that Gusick was present in Court August 22, but just what sentence and judgment was entered is a question of fact, which question should have been left to Judge Thomas. The Warden does not claim to hold Gusick by virtue of this judgment marked void. Gusick, in his petition, had indicated that, if granted a hearing, he expects to prove that this judgment was marked void at the direction of the original trial judge. The claim made by Gusick is supported by Exhibits PP, p. 319 and QQ, p. 321, from which Your Honors might now ascertain some knowledge of the nature of the contest which would have taken place before Judge Thomas if the State Supreme Court had not intervened.

The State Supreme Court held that, herein p. 44:

> "There appears in the minute entries of the court bearing date August 23 an entry of the same transaction as that recorded on August 22. Just why the clerk of the court dated this minute entry August 23 is not manifest but it is very apparent that the entry of August 23 is intended as a rewrite of what transpired on August 22. It is probable that the volume of work to be done made it impossible to rewrite it until the 23rd and that through inadvertence it was dated August 23 instead of the 22nd. No substantial change whatever was made."

Gusick contends differently in his petition. Here in this Honorable Court it is asserted by him that whether substantial changes were made can only be determined after a proper hearing. Here it is obvious that the State Supreme

Court has indulged in speculation as to what the facts may be, after Judge Thomas had indicated a willingness to permit the parties to prove the facts. As the record now stands there is absolutely no basis for the above finding that a subsequent entry was the same transaction previously had, or that the previous transaction had been properly recorded.

The State Supreme Court has held, herein p. 45:

> "It was not necessary under the constitution and laws of the state that defendant should have been present when these minute entries were written up. Neither did he have the right to be present when the formal written judgment and commitment was filed with the clerk on August 24. That judgment and commitment was also the same in all its material parts with both the minute entry of August 22 and the rewrite thereof of August 23. There is no merit whatever to petitioner's contention that he had a right to be present when these entries were made."

Here again the statement of the State Supreme Court concerning the law is correct only if the facts are straight. The finding that these various entries was the same as the original judgment has no basis in the record. If, in the original trial court of conviction, Gusick had been served notice and his presence had been required he then would have been afforded an opportunity to show Judge Jennings that the proposed changes were not mere corrections, but amounted to a new sentence. If Judge Jennings had overruled this contention, Gusick could have made his record and could have appealed. Now in the absence of notice and an opportunity to be heard before Judge Jennings, it may now be assumed by Your Honors that Judge Thomas, after a full hearing, would have decided the issues here, which issues have been arbitrarily determined by the State Supreme Court, without due process.

Gusick contends that here the State Supreme Court has decided important questions of fact without due process

which questions should have been determined in the usual manner after a proper hearing before Judge Thomas.

The State Supreme Court has held, herein p. 39:

> "If the trial court in Maricopa County had jurisdiction to pronounce judgment and sentence imposed by it on petitioner Gusick on August 22, 1951, in Cause No. 22012 then pending in that Court the trial court of Pinal County had no jurisdiction to issue the writ of habeas corpus on November 12, 1954. On the other hand if the trial court of Maricopa County was without jurisdiction to impose sentence and judgment upon defendant Gusick on August 22, 1951, the trial court of Pinal County properly issued said writ of habeas corpus."

This leaves out of consideration the claim of Gusick that the judgment was for three to five years and that that sentence had been served. Where a convict claims that his sentence has been served there cannot be the slightest question concerning the jurisdiction of Judge Thomas to determine whether or not such is the fact. The State Supreme Court has arbitrarily taken the decision of this question from Judge Thomas.

Also the above finding omits the provision of the law that jurisdiction of the Maricopa County Court must have been to enter the particular judgment complained of. The warden in this case claims authority to hold Gusick on the fourth judgment, entered in his absence. Such claim cannot be properly disposed of in accordance with due process without an opporunity to be heard.

The State Supreme Court said, herein p. 48:

> "Petitioner had been advised by his counsel that he had the right to withdraw his plea of guilty if it developed that a more severe penalty would be imposed by the court than that agreed upon between counsel and the judge. If he had made such a request and it had been denied by the court, he had a remedy by

> appeal to this court. The statement that Mr. Wilson immediately prior to sentence informed him that the sentence by the court would not be in excess of three to five years was completely refuted by the trial judge when he made the statement above quoted."

This finding seems to assume that an agreement existed. It assumes that the trial judge in fact entered twenty sentences and ignores the claim made by Gusick that the trial judge in fact entered a sentence of three to five years. This claim made by Gusick in his petition for habeas corpus is corroborated by the circumstance that no motion was made to withdraw the plea. There was no motion for new trial or in arrest of judgment. No appeal. It is the respectful contention of Gusick here in this late day in his quest for due process as guaranteed by the Fourteenth Amendment that if the State Supreme Court is correct to finding that Judge Jennings in fact refuted the agreement and proceeded to enter 20 sentences, Mr. Wilson would have objected and Gusick would have protested. If the above conclusion had been made by Judge Thomas and Gusick had been afforded an opportunity to be heard, we might ask what is meant by "refuted." Did the trial judge refute the agreement and so notify Gusick? Gusick claims that the trial judge in fact proceeded to enter judgment within the terms of the agreement. Here, in this Honorable Court Gusick contends that such question cannot properly be disposed of by the State Supreme Court in the absence of due process, and as appears from the opinion herein that Court has undertaken to decide questions of fact, without any opportunity on the part of Gusick to be heard.

The State Supreme Court said, herein p. 48:

> "Certainly it is the duty of this court to see that constitutional due process is accorded to every person charged with a criminal offense, and if the processes of law in the administration of justice are tainted with fraud, misleading a defendant to his prejudice, he

> should be accorded every right guaranteed to him under the due process clause of the State and Federal Constitutions."

It is the respectful contention of Gusick here that if Gusick were accorded the right guaranteed to him under the due process clause of the State and Federal Constitutions, he should have been afforded a hearing before Judge Thomas. Gusick did claim that the processes of law were tainted with fraud, and many other illegalities. The State Supreme Court has held these claims to be unfounded, without giving Gusick any opportunity to be heard.

The State Supreme Court said, herein p. 48:

> "In the light, however, of the statement of the court immediately prior to the pronouncement of sentence, in according to the defendant, and to his counsel, the opportunity to withdraw his plea of guilty at that time if they so desired, can it be said with any degree of sincerity that the petitioner was denied due due process of law by the trial court?"

Gusick in his petition for habeas corpus sought due process in the habeas corpus proceedings. It is his contention here that the question as to whether Gusick was offered due process by the original trial court was a question for Judge Thomas, not the State Supreme Court. Gusick had no opportunity to be heard in the State Supreme Court concerning these matters of fact ultimately decided against him.

Petitioner contends that he offered his guilty plea to but one charge, by virtue of an agreement made with the prosecutor and approved by the trial judge, under which agreement petitioner was to be sentenced to a term not to exceed five years. It is the contention of petitioner that this agreement was carried out and lived up to, by the prosecutor and the judge, up to and including the time of the rendition of the first sentence. Petitioner was sentenced to serve from

three to five years. After petitioner commenced to serve this sentence an attempt was made to increase the penalty in his absence.

Gusick raised the point that there is no such crime as fellatio. This point was decided against petitioner by the State Supreme Court, herein p. .....

It is the contention of petitioner that to allow the trial court to increase the penalty in the manner shown constitutes double jeopardy which is prohibited by the constitution. Also that twenty sentences aggregating one hundred years, if permitted to stand, would be cruel and unusual punishment, also prohibited.

When the judge announced in chambers that he had examined the evidence in the hands of the County Attorney and again went over it with Dr. McGrath, out of the presence of petitioner and his counsel, the judge did not say when he did all of this. Petitioner has alleged that this was done by the judge before the plea was tendered. So the judge not only knew of the agreement and the limit put upon the plea when it was tendered, but the judge also knew of and had inspected and studied the evidence in the hands of the prosecutor.

Petitioner also contends that when the County Attorney elected to charge petitioner in one information that the People are entitled to but one sentence. That having been served, petitioner contends that he is entitled to his discharge.

This point was expressly overruled by the State Supreme Court, herein p. 46.

Petitioner also claims that his home was searched and his property seized, without proper warrant or cause, in violation of rights guaranteed by the Fourteenth Amendment.

Judge Thomas, by ordering the issuance of the writ of habeas corpus, had indicated a willingness to hear Gusick, concerning this claim. The State Supreme Court stopped and has prohibited such hearing. The point was held, herein p. 45, to be without merit, as a proposition of law and not remotely related to the question of jurisdiction of the original trial court.

Petitioner has pointed to statements made in the Statement of Facts of Conviction, Exhibit LL, p. 143, prepared by the prosecutor and signed by the trial judge, on August 24, 1951, to show that after the original sentence of three to five years, the trial judge discovered what the judge considered as new facts and then decided to increase the penalty, or find a way to make it appear that the judge, in fact, had rendered judgment for a long term. It is the contention of petitioner that this fourth sentence entered in his absence is void. That a fundamental constitutional right requires the presence of a defendant at the time of sentence. Petitioner contends that he has served the only sentence entered in his presence and that all other sentences, with increased penalties, entered in his absence are void. Petitioner claims that the oral sentence rendered from the bench for a term of three to five years is void for many reasons shown, but as he has been in the penitentiary a sufficient length of time to satisfy one sentence, it may be deemed just to declare the sentence served.

Petitioner asserts that he has been deprived of due process of law in violation of his constitutional rights. That the writ of habeas corpus was properly issued and that he is entitled to his discharge. Petitioner claims as to each point made that he has been denied due process as guaranteed by the Constitution and laws of Arizona and further protected by the Fourteenth Amendment to the Constitution of the United States.

As is shown by Exhibit MM, p. 183, Gusick applied for and was granted a change of venue in the original trial court. It happens that the judge from whom the change of venue was taken was later elected to the State Supreme Court and is noted as having concurred in the opinion, herein p. 50. This disqualification was not called to the attention of the Justice by Gusick. If the participation has been illegal it may have been inadvertent.

A more serious charge is made by Gusick, as is shown by the record, as against the Justice who wrote the State Supreme Court opinion. When the parties were before Judge Thomas, as is shown by the reporter's transcript, the Assistant Attorney General informed Judge Thomas that he had consulted with Mr. Justice Phelps and that the Justice had orally agreed to sign a writ of prohibition immediately, if Judge Thomas should allow petitioner to give testimony. Such testimony was given and the stay order was entered by the State Supreme Court. After the cause was submitted on briefs, the Attorney for Gusick learned that Mr. Justice Phelps had made certain inquiries in the office of the Clerk of the Court of original conviction also that the State Supreme Court had without notice ordered a certain transcript made part of the record of the State Supreme Court. Thereupon Gusick made a motion to vacate this order and respectfully requested Mr. Justice Phelps to seriously consider disqualification of himself.

This motion brought no results and as appears from the opinion, herein p. 49, the State Supreme Court has based its judgment largely upon this transcript which Gusick claimed was a fraud. This method adopted by the State Supreme Court to secure information violated due process as protected by the Fourteenth Amendment.

Reasons for Granting the Writ

1. The writ of certiorari is sought because the issues presented herein raise important questions of Federal law.

2. The State Supreme Court has decided a federal question of substance not heretofore determined by this Honorable Court.*

3. The State Supreme Court has decided this case in a way not in accord with applicable decisions of this Honorable Court.

4. If it were not for a right to review in this Honorable Court the State of Arizona, acting through its Supreme Court, could deny to petitioner here the right to the protection of the Fourteenth Amendment without due process and could suspend and deny the right of petitioner to relief from illegal state custody by virtue of the time honored writ of habeas corpus.

5. We respectfully submit that many reasons for granting the writ are made obvious in our statement of this case.

6. The entire record, which shows some of the history of this case, demonstrates that Gusick has been discriminated against and that prejudice, for one reason or another has been allowed to influence the result.

Conclusion

When the Attorney General of the State applied for certiorari and obtained a stay, that official cited cases familiar to any lawyer in practice. The Supreme Court of a State, after it affirms a judgment, will not tolerate inter-

---

* Our search to date has not revealed a case such as this where the State Supreme Court took the matter from the trial court after the trial court has issued the writ of habeas corpus and had indicated a desire to hear the federal question raised in the usual manner.

ference by an inferior tribunal and will stop a trial court from permitting the relitigation of points settled by the State Supreme Court. Such cases were not in point here, as Gusick did not appeal from his original conviction. The State Supreme Court and Judge Thomas, under the Arizona law were given concurrent jurisdiction.

Judge Thomas has as much power to act as did the State Supreme Court. It is true, of course, that the State Supreme Court had the right and power to supervise Judge Thomas, but the ordinary rules of due process required that the State Supreme Court await the action of Judge Thomas, before attempting any review. This case presents the spectacle of the Attorney General obtaining an appeal in the middle of the case with no final order. This might be said to be irregular State procedure, of no concern of the federal courts, except that in taking the ball from Judge Thomas, the State Supreme Court proceeded to violate all known fundamental rules of due process in jumping at conclusions of fact without any basis. Rights guaranteed by the Fourteenth Amendment were violated by the State Supreme Court, because of its erroneous findings of fact, its misunderstanding of the law and its failure to understand the claims made by petitioner. The State Supreme Court has denied a stay of mandate, so we have made a motion for stay here. The Clerk of the State Supreme Court has furnished only a copy of the docket. We shall endeavor to obtain and request the clerk here print such record as may be required.

Respectfully submitted,

FRANCIS J. BROWN,

WM. SCOTT STEWART,

Attorneys for Petitioner.

March 1, 1955

OPINION

IN THE

Supreme Court of the State of Arizona

THE STATE OF ARIZONA, ex rel. **ROSS F. JONES**, The Attorney General of the State of Arizona,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PINAL, and **THE HONORABLE FRANK E. THOMAS**, Judge,

Respondents.

No. 6012

Original Application for Writ of Certiorari.
Petition for Habeas Corpus Filed With Trial Court Ordered Dismissed

Ross F. Jones, Attorney General, William T. Birmingham and Roderick M. Jennings, Assts. Atty. General, Attorneys for Petitioner

Respondent Judge Appears in Propria Persona

Francis J. Brown, of Phoenix appears as Attorney for Prisoner, Charles A. Gusick

PHELPS, J.:

This cause comes to us on certiorari. The ultimate question for determination is whether the application of Charles

A. Gusick for a writ of habeas corpus stated grounds sufficient to confer jurisdiction on the trial court to issue such a writ. The problem will be better understood if we set forth a rather detailed account of proceedings heretofore had in Cause No. 22012, *State of Arizona* v. *Charles A. Gusick, alias Charles A. Girard.* This criminal case had been set for trial for 10 a.m., August 17, 1951, in Division No. 6 of the Maricopa County Superior Court. On that date defendant appeared with his counsel George T. Wilson. Counsel for the State and defendant announced ready. The defendant, petitioner herein, through his counsel then and there asked leave to withdraw his plea of not guilty theretofore entered to the charge of fellatio, Counts 1 through 20 of the information. The Court entered its order permitting him to withdraw his plea of not guilty which he did and immediately entered his plea of guilty to said charge of fellatio, a felony, in Counts 1 to 20 of the information. The Court then fixed the time for passing sentence at 10 a.m., August 22, 1951.

Defendant appeared in said Court with his counsel at the appointed time and the Court imposed sentence of three to five years in the state penitentiary at Florence in each of said counts and ordered that said sentences were to run consecutively.

Defendant was duly committed to the penitentiary at Florence, Arizona, in accordance with the provisions of the sentences pronounced in open court on August 22, 1951, and the provisions of the formal written judgment and commitment thereafter filed in said Court on the following August 24. Defendant has been confined in said penitentiary since his commitment therein and now is so confined.

On November 12, 1954, petitioner through his counsel,

Francis J. Brown, filed in the Pinal County Superior Court a petition for writ of habeas corpus directed against the warden of the penitentiary. The petition including exhibits, testimony of witnesses and sundry other matters, consists of over 300 typewritten pages. Much of the petition is repetitious, much of it is wholly immaterial and redundant, and much of it is in the nature of aspersions upon the integrity, honesty and ethics of his own counsel (now deceased) in handling his case and upon the trial judge by charging that he entered into an alleged agreement with counsel for petitioner and the county attorney which he violated and that he materially changed the judgment and sentences of the Court imposed upon petitioner after petitioner had left the court room, and sundry other charges. Happily the records of the Court in that case do not support the charges made against either the attorney or the judge.

The trial judge who entertained the petition for the writ of habeas corpus issued the writ on the date the petition was filed and made it returnable forthwith. On the same date he proceeded to hear testimony from the defendant before counsel representing the State had been given a copy of the petition or had time to study the same and make a response thereto. After hearing the testimony of the petitioner the cause was then continued until 10 a.m., November 24.

On November 17, 1954, the State through its Attorney General, Ross F. Jones, made application to this Court for a writ of certiorari to test the jurisdiction of the trial court to order the issuance of a writ of habeas corpus in said cause. Certiorari issued on said date and the matter is now at issue before us for our determination.

If the trial court in Maricopa County had jurisdiction

to pronounce judgment and sentence imposed by it on petitioner Gusick on August 22, 1951, in Cause No. 22012 then pending in that Court the trial court of Pinal County had no jurisdiction to issue the writ of habeas corpus on November 12, 1954. On the other hand if the trial court of Maricopa County was without jurisdiction to impose sentence and judgment upon defendant Gusick on August 22, 1951, the trial court of Pinal County properly issued said writ of habeas corpus.

The State assigns as error:

> "That the Pinal County Superior Court exceeded its jurisdiction in issuing a writ of habeas corpus in that the petition for writ of habeas corpus does not allege, state or in any manner show on its face sufficient grounds for the issuance of a writ of habeas corpus."

It states as its first proposition of law based upon said assignment that "habeas corpus may be used to review only matters affecting the jurisdiction of the Court."

That the trial court of Maricopa County had jurisdiction both of the person and of the subject matter and had authority to pronounce sentence and judgment on August 22, 1951, in said cause upon a plea of guilty there can be no doubt. Petitioner apparently bases his claim of lack of jurisdiction to pronounce the sentence and judgment in this cause upon the ground that the Court did not comply with the mandatory provisions of the statute in such cases made and provided in that it pronounced its sentence and judgment in the absence of the defendant. We will hereinafter discuss this particular phase of his claim.

It is undoubtedly a correct statement of the law that the writ of habeas corpus may be used only to review matters affecting the jurisdiction of the court. In the case of Ex

Parte Long, 26 Okla. Cr. 259, 223 P. 710, 711, it is stated that:

> "It is undoubtedly the law that upon habeas corpus cognizance can be taken only of defects of a jurisdictional character, which render the proceeding under which the petitioner is imprisoned not merely erroneous, but absolutely void."

We stated in *State* v. *Superior Court*, 25 Ariz. 226, 233, 215 P. 538, 541, that:

> "It is well settled in this jurisdiction, and elsewhere, that mere irregularities or mistakes cannot be reviewed or corrected by the writ of habeas corpus. (Citing cases.)"

To the same effect is the case of In the Matter of the Application of Jose Silvas for a writ of habeas corpus, 16 Ariz. 41, 140, P. 988; also *State* v. *Grantham*, 30 Ariz. 591, 249 P. 758; *Oswald* v. *Martin*, 70 Ariz. 392, 396, 222 P. 2d 632. We reaffirm our previous pronouncement that the sole question involved in habeas corpus is that of jurisdiction.

Notwithstanding the multitudinous charges made in petitioner's application for writ of habeas corpus, in his brief, in support of the writ, he limits his claim to eight statements which appear to be an admixture of propositions of law and statements of alleged facts as follows:

> "I. The privilege of the accused to be present throughout the trial is the very essence of due process.
>
> "II. The trial judge failed to wait three days before sentence as required by the Code and consequently the sentence is void.
>
> "III. Habeas corpus proper remedy where judgment void as having been entered without jurisdiction, also upon expiration of sentence.
>
> "IV. The illegal search and seizure violated rights

guaranteed by the laws and constitution of Arizona and further protected by the constitution.

"V. A plea of guilty should be freely and understandingly made by one competent to know the consequences thereof, and the Court should satisfy itself as to this voluntary character of the plea before accepting it.

"VI. The receipt of information in chambers by the trial judge, in the absence of petitioner and his counsel violated the constitutional guaranty of the right of petitioner to be confronted with witnesses against him.

"VII. The people are entitled to but one satisfaction, even if twenty sentences were imposed they will be held to run concurrently.

"VIII. The punishment inflicted by the third judgment is excessive, disproportionate and constitutes cruel and unusual punishment in addition to its other defects."

We believe that proposition No. I is a correct statement of the law but it has no application to the instant case. Insofar as the records disclose and insofar as the petition for a writ of habeas corpus discloses, petitioner was present at every stage of the proceeding including August 17, 1951, when he entered his plea of guilty to Counts 1 to 20, inclusive, of the information. That plea was made by him in open court. This act on the part of petitioner concluded the trial in that case. What happened after that moment constitutes no part of his trial.

The next claim designated as No. II is a statement of fact to the effect that the trial judge failed to wait three days after the plea of guilty to pronounce sentence. The answer to that is that the record brands it as false *in toto*. The record clearly shows that on August 17 the petitioner through his counsel asked leave of the Court to withdraw his plea of not guilty to Counts 1 to 20, inclusive, of the

information. This request was granted by order of Court duly recorded and petitioner then and there withdrew his plea of not guilty and entered a plea of guilty to all of said Counts 1 to 20, inclusive. Whereupon the Court set the date of sentence for 10 a.m., August 22 following—exactly five days after plea of guilty. There was not the slightest excuse for such charge to be made.

Claim No. III is a statement of law to the effect that habeas corpus is a proper remedy where the judgment is void for lack of jurisdiction. This is unquestionably a correct statement of law as shown by authorities above cited. This claim is evidently based upon the charge in the petition for writ of habeas corpus, first, that the sentence and judgment was pronounced by the court without the presence of defendant and that the judgment order falsely recited his presence. Secondly, that petitioner has served the sentence originally "recited and rendered" in his presence and that a further and more severe sentence was written up in his absence after petitioner had been removed from the court room of the original trial court and after the original court had lost jurisdiction. This is in effect charging the judge of the trial court with the commission of a felony in falsifying the records of the court.

Petitioner is limited to the records of the Maricopa County trial court in Cause No. 22012, *supra*, in establishing his claim of lack of jurisdiction. The records show that petitioner was present in court with his counsel on August 22 when the court pronounced its sentence and judgment. Petitioner admits this in his brief. There is written on each page of the minute entry records on that date the word "void" but nowhere in the record is found a minute entry whereby the judge of the court ordered said minute entry to be voided. In the absence of such an order the minute entry of August 22 stands as a valid

minute entry of the court recording the imposition of sentence upon petitioner on that date. Minute entries are of necessity condensed to include only the essential elements required under the statutes, to wit, maximum and minimum number of years imposed in the sentence, the date of commencement of sentence, the place of imprisonment and where there is more than one count in the information whether the sentences shall run consecutively or concurrently. It is only in the recording of the formal judgment that it is copied *in toto*.

The minute entry of August 22 recording the pronouncement of sentence found the petitioner guilty of the crime of fellatio in Count 1 of the information and fixed the punishment at imprisonment in the state prison at Florence for a period of not less than three nor more than five years from date of sentence. The sentence of each succeeding count in the information up to and including Count 20 adjudged him guilty of fellatio, a felony, and imposed the same number of years as punishment therefor and said sentences were ordered to run consecutively, i.e., each was to begin at the termination of the sentence in the preceding count. There is nothing ambiguous in this sentence and this court will not indulge in subtleties and refinements in interpreting the language used in order to set aside the judgment and sentence imposed by the trial court. In his brief, petitioner has raised the point that there was no such crime as fellatio. The case of *Dutzler* v. *State*, 41 Ariz. 436, 19 P. 2d 326, expressly recognizes fellatio as the medical term for the offense defined in Section 43-407, A.C.A. 1939.

There appears in the minute entries of the court bearing date August 23 an entry of the same transaction as that recorded on August 22. Just why the clerk of the court dated this minute entry August 23 is not manifest but it

is very apparent that the entry of August 23 is intended as a rewrite of what transpired on August 22. It is probable that the volume of work to be done made it impossible to rewrite it until the 23rd and that through inadvertence it was dated August 23 instead of the 22nd. No substantial change whatever was made. The sentence imposed in the first count was the same, to wit, three to five years in the state penitentiary at Florence from the date of sentence and the place of imprisonment was the same. All subsequent counts carried the same number of years each to run consecutively with the sentence imposed in the preceding count. The minute entry should, of course, have been dated August 22 but the fact that it was dated the following day is a mere irregularity not affecting the substantial rights of the petitioner nor does it go to the jurisdiction of the court and is therefore not subject to review by habeas corpus.

It was not necessary under the constitution and laws of the state that defendant should have been present when these minute entries were written up. Neither did he have the right to be present when the formal written judgment and commitment was filed with the clerk of the court on August 24. That judgment and commitment was also the same in all its material parts with both the minute entry of August 22 and the rewrite thereof of August 23. There is no merit whatever to petitioner's contention that he had a right to be present when these entries were made.

The charges set forth in the petition for a writ of habeas corpus upon which petitioner's Claims Nos. IV, V, VI and VIII are based are not only without merit as propositions of law but are not remotely related to the question of the jurisdiction of the trial court to pronounce its judgment and sentence upon petitioner on August 22 and therefore may not be reviewed on habeas corpus

proceedings. Petitioner's sole remedy to have had these matters reviewed by this court was by timely appeal.

In Claim No. VII petitioner urges that the people are entitled to but one satisfaction and even if twenty sentences are imposed, they will be held to run concurrently. Our statute is definite upon that point. Section 44-2226, A.C.A. 1939, provides that:

> "When the defendant has been convicted of two (2) or more offenses charged in the same indictment or information the terms of imprisonment shall be served concurrently unless the court expressly directs that they or some of them be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment or information shall be served consecutively unless the court expressly directs that they or some of them be served concurrently."

The court in the instant case expressly ordered that the sentences should run consecutively.

Petitioner, in his petition for a writ of habeas corpus before the Pinal County trial court and in his brief in support thereof, claims that he has been denied due process of law in that (1) judgment and sentence committing him to the penitentiary at Florence was pronounced during his absence; (2) that search of petitioner's premises and seizure of certain paraphernalia on a John Doe warrant was illegal and that the evidence was thereafter used against defendant in determining the punishment to be imposed upon petitioner, and that the county attorney entered into a stipulation with petitioner's counsel that petitioner might plead guilty to one count in the information fixing a lesser sentence than that pronounced by the court and that the court agreed to such stipulation and that thereby petitioner was misled in entering a plea of guilty and understood that he was entering a plea of guilty only to one count, and that he was thereby deprived

of his constitutional right to change his plea to that of not guilty.

Petitioner further states that his own counsel informed him immediately before the pronouncement of sentence that "there was not time to report and explain all that which had taken place in chambers but that the Judge had indicated that the sentence would be somewhere between one and five years." Mr. Wilson said that "* * * the sentence might be for more than one year but it surely would be less than five years, possibly three." Petitioner further stated that:

> "* * * Mr. Wilson also informed petitioner that if anything should develop between the time of the entry of the guilty plea and the sentence which was to be rendered, to cause the prosecutor or the judge to have any desire to repudiate the agreement, or if the sentence was entered without any regard for the agreement, or the mitigating circumstances, that the law gave to Your petitioner the right to withdraw the plea and demand a jury trial. * * *"

Immediately prior to the pronouncement of sentence and after the Judge, and counsel for the state and defendant had re-entered the court room the Court made the following statement to petitioner and his counsel:

> "This is the time fixed for passing of sentence, Mr. Gusick. Have you or your counsel, Mr. Wilson, any legal reason to show why the sentence of the Court should not be pronounced at this time?
>
> "MR. WILSON: If the Court please, this Court accorded an opportunity to both sides to present an argument in this matter. We have done that. There is nothing to add at this time."

The Court, after considerable dissertation made the following statement:

> "I have outlined to you why I feel the way I do. I feel in a case where it is not a matter of illness

> that this court has never given a tap on the wrist, I have given the limit, and I see no reason to do otherwise in this case, because I don't think Mr. Gusick should be back in this vicinity in the next few weeks. I propose to govern myself accordingly. And it is widespread. He took advantage of these boys and their families and it has been not only in this locality but all over the country. Taking those movies, seducing the boy and taking movies of him and the boy then knows he is trapped. *I feel there is nothing to do but—well, in fact, the doctor has indicated to me that he had the same feeling that I had, that there is only one thing to do with a man like this and lock him up from now on. The Court proposes to do that. Have either of you anything further to say?*" (Emphasis supplied.)

When neither Mr. Wilson nor Mr. Gusick indicated that they had anything further to say or any desire to withdraw the plea of guilty and enter a plea of not guilty the court proceeded to pronounce sentence and judgment upon the petitioner. Certainly it is the duty of this court to see that constitutional due process is accorded to every person charged with a criminal offense, and if the processes of law in the administration of justice are tainted with fraud, misleading a defendant to his prejudice, he should be accorded every right guaranteed to him under the due process clause of the State and Federal Constitutions.

In the light, however, of the statement of the court immediately prior to the pronouncement of sentence, in according to the defendant, and to his counsel, the opportunity to withdraw his plea of guilty at that time if they so desired, can it be said with any degree of sincerity that the petitioner was denied due process of law by the trial court? Can it be said that he was misled to believe that the sentence would be pronounced only upon one count in the information? Can the statement that he was denied the right to withdraw his plea of guilty and change it to that of not guilty carry with it any degree of conviction? Petitioner

had been advised by his counsel that he had the right to withdraw his plea of guilty if it developed that a more severe penalty would be imposed by the court than that agreed upon between counsel and the judge. If he had made such a request and it had been denied by the court, he had a remedy by appeal to this court. The statement that Mr. Wilson immediately prior to sentence informed him that the sentence by the court would not be in excess of three to five years was completely refuted by the trial judge when he made the statement above quoted.

The State in its brief on certiorari to this court has fully covered all of these claims and we have undertaken to discuss them in line with the questions of law raised by the State therein without referring specifically to each proposition of law set forth by it.

In view of the scandalous matter both against a deceased member of this Bar who bore a good reputation in this community as an able lawyer whose ethics were never questioned and in view of the charges made against a trial judge of this state which, if true, might subject him to prosecution on a criminal charge, we believe it not only proper but in a sense mandatory that we take cognizance of such charges. For the sole purpose of ascertaining if the charges made were true we ordered a transcript of the language used by the trial court in pronouncing its sentence upon petitioner on August 22 to be made a part of the record in this case and it conclusively refutes the charges made against the trial judge relating to falsifying the records of his court. We want to believe that counsel *did not know* that the judgment and sentence of the trial court pronounced upon petitioner on August 22, 1951, was taken down in shorthand and later transcribed and filed in Cause No. 22012 in April, 1954, several months before the application for habeas corpus was filed in the Superior Court of Pinal County. We

would also like to believe that counsel (although he did not incorporate the transcript in the record before the Pinal County trial court) intended to make it a part of the record of that case on the hearing of the application for the writ of habeas corpus. If counsel did know of its existence it was his bounden duty to incorporate it in the record in the habeas corpus proceedings in fairness to the trial judge of Pinal County and if he knew of its contents the charges made against the trial judge were wholly unjustified.

It is the holding of this court that the application of petitioner for a writ of habeas corpus fails to state grounds justifying the issuance of such writ and the court erred in issuing the same. The records in said cause brought here on a writ of certiorari are remanded to the trial court of Pinal County with instructions to dismiss said petition.

M. T. PHELPS,
Justice.

CONCURRING:

ARTHUR T. LAPRADE,
Chief Justice.

LEVI S. UDALL,
Justice.

DUDLEY W. WINDES,
Justice.

FRED C. STRUCKMEYER, JR.,
Justice.